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No. 03-1116 and No. 03-1120

Supreme Court, U.S.
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In the Supreme Court of the United States

JENNIFER M. GRANHOLM, ET AL., PETITIONERS

v.

ELEANOR HEALD, ET AL.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, PETITIONER

v.

ELEANOR HEALD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state law allowing in-state wineries to make direct shipments of wine to consumers, but barring out-of-state wineries from doing so, is discriminatory and therefore violates the Commerce Clause of the Constitution, notwithstanding section 2 of the Twenty-first Amendment.

PARTIES TO THE PROCEEDINGS

The petitioners in No. 03-1116, who were defendants-appellees below and who are nominal respondents in No. 03-1120, are Jennifer M. Granholm, Governor of the State of Michigan; Michael A. Cox, Attorney General of the State of Michigan; and Nida R. Samona, Chairperson of the Michigan Liquor Control Commission.

The petitioner in No. 03-1120, which was an intervening defendant-appellee below and which is a nominal respondent in No. 03-1116, is the Michigan Beer and Wine Wholesalers Association.

Respondents in both No. 03-1116 and No. 03-1120, who were plaintiffs-appellants below, are Eleanor Heald; Ray Heald; John Arundel; Karen Brown; Richard Brown; Bonnie McMinn; Gregory Stein; Michelle Morlan; William Horwath; Margaret Christina; Robert Christina; Trisha Hopkins; Jim Hopkins; and Domaine Alfred, Inc.

STATEMENT PURSUANT TO RULE 29.6

Domaine Alfred, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

These petitions present a novel constitutional question: whether protectionist, anti-consumer state laws allowing in-state wineries to make direct shipments of wine to consumers, but barring out-of-state ones from doing so, are unconstitutional under the Commerce Clause, despite the regulatory power granted to States by section 2 of the Twenty-first Amendment.

While undeniably interesting, this constitutional question does not mandate the Court's attention at this time. When measured against the traditional standards for granting certiorari, this Court's review is, for now, unwarranted. Contrary to petitioners' assertions, no genuine circuit split exists on whether discriminatory state laws allowing direct shipping by in-state wineries, but barring direct shipping by out-of-state wineries, are unconstitutional. All of the circuits that have passed on the constitutionality of such discriminatory laws have invalidated them, consistent with this Court's recent pronouncements on the relationship between the Commerce Clause and the Twenty-first Amendment. Other circuits either have upheld narrower state laws on the ground that they do not discriminate against out-of-state interests, or have refrained from ruling pending further factual development.

Moreover, this case presents a less than ideal vehicle for consideration of the underlying constitutional question. At a minimum, this Court should await a case that presents *both* the question whether a plainly discriminatory state law is constitutional, *and* the related (and itself substantial) question whether, if such a law is unconstitutional, the appropriate remedy is to allow direct shipping by out-of-state wineries or to ban direct shipping by in-state wineries. And this Court can afford to wait, both because other challenges to direct-shipping laws are currently pending in the federal courts and because States are increasingly repealing such laws and enacting non-discriminatory ones in response to the outcry from consumers and wineries alike. The petitions for certiorari should therefore

be denied. In the alternative, in light of a recent Federal Trade Commission report condemning such discriminatory laws, and in light of the broader federal regulatory interests here, the Court may wish to call for the views of the Solicitor General.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the petitions at 03-1116 Pet. 1-2 and 44a-71a and 03-1120 Pet. 2 and 45a-69a.

COUNTERSTATEMENT OF THE CASE

1. In 1933, the Twenty-first Amendment was ratified, ending Prohibition. In its wake, most States adopted a "three-tier" regulatory system for alcohol distribution. *See* 03-1116 Pet. 2. Under that system, producers of alcoholic beverages are typically required to sell their products to licensed wholesalers or distributors, who in turn sell to retailers, who in turn sell to consumers. *See* Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* 5 (July 2003) (hereafter "FTC Report"). In addition, producers of alcoholic beverages who wish to sell their products in interstate commerce are required to obtain a "basic permit" from the federal Alcohol and Tobacco Tax and Trade Bureau (a recent spinoff from the Bureau of Alcohol, Tobacco and Firearms). *See* 27 U.S.C. §§ 203-204.

In the decades since States initially adopted the "three-tier" regulatory system, the American wine industry has grown exponentially. There are now more than 3,000 wineries in all 50 States—over twice as many as there were 30 years ago. *See* WineAmerica, *Wine Facts 2004*, *at* http://www.americanwineries.org/winedata/winefacts04.htm (last visited Apr. 5, 2004); FTC Report 6. Many of these wineries produce relatively small amounts of wine. *See id.* And there has been an accompanying explosion in wine-related tourism—even in States not previously known for their wine industries, such as

Virginia. *See, e.g.*, James T. Yenckel, *Virginia Vintage*, L.A. Times, July 1, 2001, at L13.

While the number of wineries has grown dramatically, the number of wholesalers that distribute wine has correspondingly shrunk, from several thousand in the 1950s to a few hundred today. *See* FTC Report 6. As a result of this consolidation, many wineries, especially smaller ones, have found it increasingly difficult to identify wholesalers willing to carry their products. *See id.* Consumers have likewise complained that they are unable to obtain certain wines from local retailers or to ship wine home when touring out-of-state wineries. *See, e.g.*, *Beskind v. Easley*, 325 F.3d 506, 510-11 (4th Cir. 2003) (discussing typical claims). In addition, with the advent of the Internet, consumers have increasingly sought to order wine online. *See* FTC Report 5.

In response, some 26 States have thus far passed laws allowing in-state and out-of-state wineries to make direct shipments of wine to consumers. *See* Wine Institute, *Direct Shipment Laws by State for Wineries*, *at* http://www.wineinstitute.org/shipwine/analysis/intro_analysis.htm (last modified Mar. 15, 2004). While varying somewhat, these laws typically allow consumers to order restricted amounts of wine from in-state wineries or wineries in States that have reciprocal laws. *See* FTC Report 8. Most of these laws require wineries to obtain licenses before engaging in direct shipping, to remit taxes on their shipments, and to label their packages or obtain an adult signature to prevent wine from being delivered to minors. *See id.* at 8, 26-40.

A number of other States, however, have passed discriminatory laws allowing only in-state wineries, and not out-of-state wineries, to make direct shipments to consumers. In doing so, many state legislatures have candidly admitted their desire to promote the in-state wine industry at the expense of the out-of-state wine industry, by increasing the sale and consumption of wine produced by in-state wineries. *See, e.g.*,

Dickerson v. Bailey, 336 F.3d 388, 399 (5th Cir. 2003) (detailing legislative history of Texas Wine Marketing Act). Wineries and consumers have filed lawsuits around the country, challenging the constitutionality of laws in this latter category.

2. The instant lawsuit involves Michigan's laws governing direct shipping. While the operation of the Michigan Liquor Control Code is somewhat complex, the bottom line is not: Michigan allows only in-state wineries, and not out-of-state wineries, to make direct shipments to Michigan consumers. Specifically, Michigan law enables only licensed "wine makers" to make direct shipments. *See* Mich. Comp. Laws § 436.1113(9); *cf.* Mich. Comp. Laws § 436.1111(7) (defining "sale"). The Michigan Liquor Control Commission has construed this statutory provision to allow only in-state wineries, and not out-of-state wineries, to obtain a "wine maker" license. *See* C.A. App. 97-100, 104-05.[1] Out-of-state

[1] Michigan contends that out-of-state wineries "may apply to the Liquor Control Commission to direct ship to consumers and bypass the three-tier system by Commission order." 03-1116 Pet. 3. The statutory provision Michigan cites for that proposition, however, is merely a generic statute stating that the sale or importation of alcohol in Michigan is banned unless authorized by the commission. *See* Mich. Comp. Laws § 436.1203(1). Michigan concedes, as it must, that "[t]he policy of the Liquor Control Commission" has been to deny applications by out-of-state wineries to obtain licenses to engage in direct shipping, 03-1116 Pet. 3, and indeed freely recognizes that "[i]n-state wineries are excepted from the three-tier system," *id.* at 4.

Petitioners alternatively contend that "[a]ny qualified out-of-state manufacturer may establish a physical presence in Michigan and be licensed in Michigan as a wine maker." 03-1120 Pet. 5 n.2; *see also* 03-1116 Pet. 23 (same). But petitioners did not make this argument before the Sixth Circuit. *See, e.g.*, C.A. Br. of Intervenor 21 n.8 (discussing "wine maker" provision). Moreover, in order to qualify for a "wine maker" license under the Michigan Liquor Control Commission's construction, an out-of-state winery would actually have to open a *winery* in Michigan, not merely "establish a physical presence" (say, by opening an office). *See* C.A. App. 97-100, 104-05; *cf.* 03-1120 Pet. 10 (contending that "out-of-state wineries may equally *locate* in Michigan and be licensed to sell directly") (emphasis added).

wineries may obtain only an "outstate seller of wine" license, which enables them to make shipments only to licensed wholesalers for distribution through the preexisting "three-tier" system. *See* Mich. Comp. Laws §§ 436.1109(9), 436.1607(1); Mich. Admin. Code rr. 436.1705(2)(d), 436.1719(5).[2]

3. Plaintiffs, various Michigan wine consumers and journalists and an out-of-state winery, brought suit against defendants, various state officials (hereafter "Michigan"), contending that the Michigan regulatory scheme discriminated against interstate commerce in violation of the dormant Commerce Clause. The defendants contended that the Michigan regulatory scheme constituted a valid exercise of the State's power under section 2 of the Twenty-first Amendment. Michigan Beer & Wine Wholesalers Association (hereafter "the wholesalers"), a lobbying organization for the Michigan liquor-distribution industry, intervened in support of the defendants.

In a brief unpublished opinion, the district court granted summary judgment to the defendants, and denied summary judgment to the plaintiffs. *See* 03-1116 Pet. 25a-35a; 03-1120 Pet. 25a-35a. The court observed that the case law concerning direct-shipping laws was "sparse." *See* 03-1116 Pet. 29a; 03-1120 Pet. 29a. Relying heavily on the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000)—the only extant court of appeals decision on the constitutionality of a direct-shipping law—the court reasoned that section 2 of the Twenty-first Amendment "authorize[d] the

[2] Michigan claims that petitioners conceded below that "there was nothing in the Michigan law that prohibits out-of-state direct sales and shipments of beverage alcohol." 03-1116 Pet. 19. While petitioners did concede that there is no Michigan statutory provision *specifically* prohibiting direct shipments by out-of-state wineries, *see* C.A. Br. of Appellants 3 n.1, it is undisputed that (1) *any* sale of alcohol in Michigan is banned unless otherwise authorized by the Liquor Control Commission, *see* Mich. Comp. Laws § 436.1203(1), and (2) out-of-state wineries cannot obtain authorization to engage in direct shipping, *see* Mich. Comp. Laws § 436.1113(9); C.A. App. 97-100, 104-05.

states to control alcohol in ways that it [*sic*] cannot control cheese." 03-1116 Pet. 33a; 03-1120 Pet. 33a (internal quotation omitted). The court conceded that a State's power under the Twenty-first Amendment was not "complete." *See* 03-1116 Pet. 34a; 03-1120 Pet. 34a. In order to avail itself of the Twenty-first Amendment, the court continued, a State must act in such a way as to further the "core" concerns of the amendment. *See* 03-1116 Pet. 34a; 03-1120 Pet. 34a. In a single paragraph of analysis, the court stated that Michigan's direct-shipping scheme furthered such a core concern because it was "one provision of a comprehensive system that regulates the flow of alcoholic beverages into and within the State of Michigan." 03-1116 Pet. 34a; 03-1120 Pet. 34a. The court concluded that this overall system was necessary to ensure the collection of taxes and to reduce the risk that minors would obtain alcohol. *See* 03-1116 Pet. 34a-35a; 03-1120 Pet. 34-35a. The court then denied plaintiffs' motion for reconsideration, stating that "[t]he three-tier distribution system is a proper exercise of [Michigan's] constitutional authority" under the Twenty-first Amendment. 03-1116 Pet. 38a-39a; 03-1120 Pet. 39a.

4. The Sixth Circuit (Daughtrey, J., joined by Guy and Boggs, JJ.) reversed. *See* 03-1116 Pet. 1-18a; 03-1120 Pet. 1a-17a. The court began by recognizing that, in a series of decisions immediately after ratification of the Twenty-first Amendment, the Supreme Court had "afforded the states nearly limitless power to regulate alcohol under the new amendment." 03-1116 Pet. 8a; 03-1120 Pet. 8a. The court reasoned, however, that Michigan's reliance on those cases was "disingenuous at best because, as early as the 1960s, the Supreme Court signaled a break with this line of reasoning." 03-1116 Pet. 9a; 03-1120 Pet. 8a. Under this Court's subsequent cases, the court continued, challenges to state alcohol laws should be assessed by "determining how closely related the law in question is to the 'core concerns' of the

Twenty-first Amendment." 03-1116 Pet. 10a; 03-1120 Pet. 9a.

After reviewing this Court's more recent cases, the Sixth Circuit concluded that the mere fact that a State was *motivated* by the "core concerns" of the Twenty-first Amendment could not "shield its laws from constitutional scrutiny." 03-1116 Pet. 11a; 03-1120 Pet. 10a-11a. The court noted that facially discriminatory laws are still subject to strict scrutiny under the dormant Commerce Clause, with the result that the State must prove that no reasonable non-discriminatory alternatives are available to advance the State's legitimate purposes. *See* 03-1116 Pet. 11a; 03-1120 Pet. 11a. The court "reject[ed] the implication that a state's 'virtually complete control' over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." 03-1116 Pet. 12a; 03-1120 Pet. 11a. According to the court, such an approach was "simply forbid[den]" by this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which struck down a tax exemption for certain locally produced alcoholic beverages. 03-1116 Pet. 12a; 03-1120 Pet. 11a.

Applying this analytical framework to the Michigan statute, the Sixth Circuit rejected the district court's characterization of the Michigan direct-shipping scheme as a "constitutionally benign product of the state's three-tier system." 03-1116 Pet. 12a; 03-1120 Pet. 11a. As to the dormant Commerce Clause, the court concluded that "it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state." 03-1116 Pet. 14a; 03-1120 Pet. 13a. The court noted that, under the Michigan system, in-state wineries would enjoy both greater access to consumers and greater profits by virtue of their exemption from the three-tier system. *See* 03-1116 Pet. 14a; 03-1120 Pet. 13a.

The Sixth Circuit then considered whether the Michigan direct-shipping scheme furthered any of the "core concerns" of the Twenty-First Amendment and, if so, whether those concerns

could be adequately served by any non-discriminatory alternatives. *See* 03-1116 Pet. 15a; 03-1120 Pet. 14a. The court answered no to both questions. *See* 03-1116 Pet. 15a; 03-1120 Pet. 14a. The court added that "the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of temperance, ensuring an orderly market, and raising revenue, but whether the discriminatory scheme challenged in this case * * * does so." 03-1116 Pet. 15a; 03-1120 Pet. 14a (internal quotation omitted).

Finally, the Sixth Circuit rejected the district court's reliance on the Seventh Circuit's decision in *Bridenbaugh*. *See* 03-1116 Pet. 16a-17a; 03-1120 Pet. 15a-17a. The court reasoned that *Bridenbaugh* was "distinguishable on its facts." 03-1116 Pet. 16a; 03-1120 Pet. 16a. It noted that *Bridenbaugh* "did not involve any out-of-state wineries as plaintiffs, and it thus addressed only whether the Indiana statute discriminated against customers who wanted to have out-of-state wine shipped directly to them." 03-1116 Pet. 17a; 03-1120 Pet. 16a. The court added that "it appears the Indiana statutes differ from the provisions at issue here," because those statutes required every drop of liquor, whether from an in-state or out-of-state producer, to pass through the "three-tier" system. 03-1116 Pet. 17a; 03-1120 Pet. 16a. Finally, the court noted that, in *Bridenbaugh*, the out-of-state sellers did not have or want permits, whereas here, the out-of-state sellers wanted permits and were willing to pay taxes on any direct shipments. *See* 03-1116 Pet. 17a; 03-1120 Pet. 16a-17a.

5. Both Michigan and the wholesalers petitioned for rehearing by the panel and rehearing *en banc*. The Sixth Circuit denied both petitions without dissent. *See* 03-1116 Pet. 21a-22a; 03-1120 Pet. 21a-22a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY HELD THAT MICHIGAN'S DIRECT-SHIPPING SCHEME IS UNCONSTITUTIONAL.

The Sixth Circuit's holding that the Michigan direct-shipping scheme is discriminatory under the dormant Commerce Clause, and cannot be "saved" from a holding of unconstitutionality by section 2 of the Twenty-first Amendment, is entirely consistent with this Court's precedents—especially the Court's recent precedents addressing the interplay between those two constitutional provisions.

A. This Court has a long history of reviewing state regulations regarding alcoholic beverages. Before the Civil War, the Court held that States had essentially plenary power to regulate the production and trade of alcoholic beverages within their borders. *See License Cases*, 46 U.S. (5 How.) 504, 577 (1847) (Taney, C.J.). In the late nineteenth century, however, the Court, applying its then-prevailing muscular view of the dormant Commerce Clause, began to whittle away at that power. Thus, while the Court continued to allow States to prohibit the production and consumption of alcohol within their borders, *see Mugler v. Kansas*, 123 U.S. 623, 661-63 (1887), the Court also held that States could not restrict the *importation* of liquor to persons possessing a permit, *see Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 499-500 (1888), and then held that States could not regulate the importation or *resale* of alcohol as long as the alcohol remained in its original package, *see Leisy v. Hardin*, 135 U.S. 100, 108-10 (1890).

The practical, and perverse, result of these decisions was that States could regulate alcohol produced by in-state persons, but not alcohol produced by out-of-state persons. In order to eliminate this disparity, Congress enacted the Wilson Act, which authorized States to regulate imported alcohol "to the same extent and in the same manner" as non-imported alcohol.

26 Stat. 313 (1890). This Court, however, construed the Wilson Act to empower States to regulate only the *resale* of imported alcohol, not the direct *shipment* of alcohol to consumers. *See Rhodes v. Iowa*, 170 U.S. 412, 423 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 446 (1898). Again acting to eliminate the disparity in treatment between in-state and out-of-state producers, therefore, Congress passed the Webb-Kenyon Act, which states, in relevant part, that "[t]he shipment or transportation * * * of * * * intoxicating liquor of any kind from one State, Territory, or District of the United States * * * into any State, Territory, or District of the United States * * * to be received, possessed, sold, or in any manner used * * * in violation of any law of such State, Territory, or District * * * is prohibited." 37 Stat. 699 (1913).[3]

B. In 1919, the Eighteenth Amendment was ratified, and the "Noble Experiment" of nationwide Prohibition began. *See, e.g.*, William E. Leuchtenburg, *The Perils of Prosperity 1914-1932*, at 212-17 (2d ed. 1993). In 1933, that experiment came to an end with the ratification of the Twenty-first Amendment. Section 1 of that amendment repealed the Eighteenth Amendment, and thereby ended nationwide Prohibition. For its part, the lesser-known section 2 of that amendment effectively "incorporate[d] [the Webb-Kenyon Act] permanently in the Constitution." 76 Cong. Rec. 4172 (1933) (statement of Sen. Robinson). Section 2, whose language tracks that of the Webb-Kenyon Act almost exactly, was designed to put to rest any lingering doubts about the Webb-Kenyon Act's own constitutionality. *See id.* at 4170 (statement of Sen. Borah). Numerous members of Congress—including Senator Blaine, the amendment's sponsor—stated that the purpose of section 2 was to authorize those States that wished to remain "dry" to do so. *See, e.g., id.* at 4141 (statement of Sen. Blaine); *id.* at 4170 (statement of Sen. Borah); *id.* at 4518 (statement of Rep.

[3] The Webb-Kenyon Act is reproduced in full at 03-1316 Pet. 44a and 03-1320 Pet. 46a. It is now codified at 27 U.S.C. § 122.

Robinson); *id.* at 4522-23 (statement of Rep. McSwain); *id.* at 4526 (statement of Rep. Tierney). Delegates to the state ratifying conventions made similar comments. *See, e.g., Ratification of the Twenty-first Amendment to the Constitution of the United States* 104, 316 (Everett Somerville Brown ed., 1938) (reprinted 1970). As with the Webb-Kenyon Act itself, nothing in the legislative or ratification history of the Twenty-first Amendment specifically indicates that section 2 was intended to allow States to discriminate *in favor of* in-state producers, at the expense of out-of-state ones.

C. In a series of short opinions in the period following the ratification of the Twenty-first Amendment, this Court did suggest that the power of States to regulate under section 2 was quite generous. *See, e.g., State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62-64 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 537-38 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 397-98 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939); *Carter v. Virginia*, 321 U.S. 131, 136-38 (1944). But despite some broad statements to the effect that a State's power under section 2 is "unfettered by the Commerce Clause," *e.g., Ziffrin*, 308 U.S. at 138, even those early cases do not unambiguously stand for the proposition that section 2 authorizes *discrimination* against out-of-state producers.

In *Young's Market*—the case on which all of this Court's other early cases rely—this Court considered a constitutional challenge by wholesalers to California's post-Prohibition regulatory scheme, under which wholesalers were required to pay $50 for a wholesaler's license in order to distribute beer, and importers were required to pay an additional $500 in order to import beer into the State. *See* 299 U.S. at 60-61. Somewhat curiously, the Court began by *rejecting* plaintiffs' contention that this scheme was discriminatory and thereby violated the

dormant Commerce Clause. *See id.* at 61-62. The Court reasoned that, while the scheme may have imposed a burden on interstate commerce, "there is no discrimination against [plaintiffs] qua wholesalers," since wholesalers paid the same fee to sell either imported or domestic beer. *Id.* at 61. The Court therefore concluded that "the case does not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. To be sure, the Court went on to reject the argument that, under section 2, "if [a State] permits [the] manufacture and sale [of alcohol], it must let imported liquors compete with the domestic on equal terms." *Id.* But the Court simultaneously rejected the contention that "the amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution." *Id.* at 64. Therefore, insofar as subsequent cases characterized *Young's Market* as affirmatively holding that "discrimination against imported liquor is permissible," *e.g.*, *Mahoney*, 304 U.S. at 403, that characterization is at best questionable.

D. To the extent that some language in the Court's early cases interpreting the Twenty-first Amendment suggested that a State's power under section 2 was effectively unlimited, the Court soon after began distancing itself from such a view. In cases arising in a variety of contexts, the Court made clear that "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Thus, the Court held that section 2 did not alter analysis of the constitutionality of state laws under the Due Process Clause, *see Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971); the Equal Protection Clause, *see Craig v. Boren*, 429 U.S. 190, 204-09 (1976); the Export-Import Clause, *see Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-46 (1964); the Establishment Clause, *see Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982); or the Free Speech Clause, *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516

(1996). The Court also held that, despite section 2, certain state laws relating to alcohol could be preempted by conflicting federal law enacted under Congress' affirmative Commerce Clause power. *See, e.g., Capital Cities*, 467 U.S. at 711-16; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-14 (1980).

The Court did continue to recognize that section 2 "created an exception to the normal operation of the Commerce Clause." *Craig*, 429 U.S. at 206. The Court expressly stated, however, that section 2 does not give States unfettered power to regulate notwithstanding the dormant Commerce Clause. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), the Court considered the constitutionality of an action by the New York State Liquor Authority to terminate duty-free sales of alcohol to departing international airline travelers. At the outset, the Court noted that, absent the Twenty-first Amendment, the New York authorities would plainly have lacked the power to prohibit such sales, since the alcohol in question merely traveled through the State (under the auspices of the federal Bureau of Customs) for delivery to consumers in foreign countries. *See id.* at 329. The Court conceded that, "in the early years following adoption of the Twenty-first Amendment," it had "made clear * * * that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.* at 330. The Court added, however, that "[t]o draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would * * * be an absurd oversimplification." *Id.* at 331-32. The Court further noted that "[i]f the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor." *Id.* at 332. "Such a

conclusion," the Court continued, "would be patently bizarre and is demonstrably incorrect." *Id.*

The Court concluded that because "the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.* Reasoning that New York's interest in regulating alcohol for ultimate use in a foreign country was comparatively slight, the Court held that the State's action was invalid. *See id.* at 333-34.

E. In its three most recent decisions specifically addressing the interplay between the dormant Commerce Clause and the Twenty-first Amendment, the Court has made clear that the Twenty-first Amendment "has a barely discernible effect in Commerce Clause cases." *City of Newport v. Iacobucci*, 479 U.S. 92, 98 (1986) (Stevens, J., dissenting). Most notably, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court considered the validity of a Hawaii statute that provided a tax exemption for certain locally produced alcoholic beverages. The Court began by recognizing that it had taken two different approaches in dormant Commerce Clause cases. *See id.* at 270. Where state legislation constituted "economic protectionism"—either because it had a discriminatory purpose or a discriminatory effect—the Court had applied a "stricter rule of invalidity." *Id.* Where, on the other hand, state legislation did not constitute "economic protectionism" but nevertheless burdened interstate commerce, the Court had adopted a "more flexible approach," inquiring into the "balance between local benefits and the burden on interstate commerce." *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). The Court noted that the Hawaii statute had *both* a discriminatory purpose, since it was undisputed that the purpose of the exemption was to aid Hawaii industry, *and* a discriminatory effect, because the exemption applied only to locally produced beverages. *See id.* at 271. The Court rejected Hawaii's arguments that the tax

exemption was necessary because the local industry was struggling and that the exemption was designed to aid local producers rather than harm out-of-state ones. *See id.* at 272-73.

The Court then considered whether the tax exemption was "saved" by the Twenty-first Amendment. *See id.* at 274-76. The Court, citing *Young's Market* and other early cases, reasoned that "[d]espite broad language in some of the opinions of this Court written shortly after ratification of the Amendment, more recently we have recognized the obscurity of the legislative history of § 2." *Id.* at 274 (footnote omitted).[4] Relying on its decision in *Hostetter*, the Court noted that "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 275. The Court reasoned that "[t]he question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption * * * to outweigh the Commerce Clause principles that would otherwise be offended." *Id.*

Applying that approach, the Court concluded that the Twenty-first Amendment did not affect the analysis of the tax exemption's constitutionality. *See id.* at 276. The Court reasoned that it was "certain" that "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* And the Court added that "[s]tate laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* Because the tax exemption

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[4] Notwithstanding petitioners' claims that "no Supreme Court case to date has directly overruled" *Young's Market* and the Court's other early Twenty-first Amendment decisions, 03-1116 Pet. 10 n.7, and that "these foundation cases [cannot] be written off as historical relics," 03-1120 Pet. 8, the *Bacchus* Court plainly refused to follow the "broad language" in those cases—over Justice Stevens' objection, in dissent, that *Young's Market* compelled the opposite result, *see Bacchus*, 468 U.S. at 282-87.

was not justified by a desire to promote temperance or to carry out any other purpose of the Twenty-first Amendment, the Court rejected Hawaii's reliance on the amendment, and invalidated the statute. *See id.*[5]

In two other cases, the Court applied similar reasoning in refusing to "save" state legislation under the Twenty-first Amendment. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). In both cases, the Court considered the constitutionality of price-affirmation statutes, which required alcohol producers to affirm that they were selling their products at a price no higher than the lowest price elsewhere in the country. *See Brown-Forman*, 476 U.S. at 576; *Healy*, 491 U.S. at 328. In *Brown-Forman*, the Court held that a "prospective" price-affirmation statute violated the dormant Commerce Clause because it had the impermissible effect of regulating prices in other States. *See* 476 U.S. at 578-84. The Court reasoned that the statute could not be "saved" because the Twenty-first Amendment gave States no authority to control sales in other States. *See id.* at 584-85. In *Healy*, the Court held that a "contemporaneous" price-affirmation statute was invalid under the dormant Commerce Clause, not only because the statute impermissibly regulated prices in other States but also because the statute discriminated against alcohol producers and shippers engaged in interstate commerce. *See* 491 U.S. at 335-41. Following *Brown-Forman*, the Court reasoned that the statute could not be "saved" because the Twenty-first Amendment conferred no authority on States to regulate

[5] Petitioners suggest that the Court's Twenty-first Amendment analysis in *Bacchus* should somehow be discounted because "the 21st Amendment was never even raised as an issue in that case until it was before this Court," 03-1116 Pet. 12, and because "the State * * * barely attempted to invoke the Amendment in its defense," 03-1120 Pet. 10. The mere fact that an argument was not made below or was not made at length, however, does not magically render this Court's discussion of the argument dictum.

extraterritorially. *See id.* at 341-42. In an opinion concurring in the judgment, Justice Scalia, citing *Bacchus*, concluded that "[the law's] discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 344.[6]

F. Notwithstanding petitioners' efforts to distinguish this Court's cases on the interplay between the dormant Commerce Clause and the Twenty-first Amendment, *see, e.g.*, 03-1116 Pet. 10-13; 03-1120 Pet. 4, 10, those cases compel the result reached below. Under this Court's dormant Commerce Clause jurisprudence, state statutes that directly regulate or discriminate against interstate commerce, or that have the effect of favoring in-state interests over out-of-state ones, are "virtually *per se* invalid." *Brown-Forman*, 476 U.S. at 579.[7] As the Sixth Circuit correctly concluded, "it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state." 03-1116 Pet. 14a; 03-1120 Pet. 13a. Like Hawaii's taxation scheme in *Bacchus*, *see* 468 U.S. at 271, the Michigan direct-

[6] In *North Dakota v. United States*, 495 U.S. 423 (1990), the Court considered whether a State's reporting and labeling regulations applicable to alcohol shipped into federal enclaves were valid under the intergovernmental immunity doctrine. The Court held that they were. *See id.* at 434-44 (plurality opinion); *id.* at 444-48 (Scalia, J., concurring in the judgment). In dictum, Justice Stevens, writing for four Justices, stated that the State's "comprehensive system for the distribution of liquor within its borders" was enacted "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue," and was thus "unquestionably legitimate" under the Twenty-first Amendment. *Id.* at 432 (plurality opinion).

[7] While the wholesalers accuse the Sixth Circuit of employing "the kind of judicial hostility usually associated with restrictions on speech or racial classifications," 03-1120 Pet. 9-10, there can be no doubt that this Court has applied heightened scrutiny to laws that discriminate against out-of-state commerce, just as it has to laws that discriminate against individuals or laws that restrict fundamental rights.

shipping scheme plainly has a discriminatory effect.[8]

As the Sixth Circuit also correctly concluded, petitioners cannot show either that the Michigan direct-shipping scheme "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," as is necessary to save a discriminatory statute under the dormant Commerce Clause, *e.g.*, *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988), or that it is "designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment," as is necessary to save a discriminatory statute under section 2, *e.g.*, *Bacchus*, 468 U.S. at 276. Although petitioners protest that the prohibition on direct shipping by only out-of-state wineries is necessary to "prevent sales to minors, ensure applicable excise and sales taxes are collected, and that equal exposure to the State's strict alcohol regulatory regiment [*sic*] is achieved," 03-1116 Pet. 23; *see also* 03-1120 Pet. 6 (same), Michigan could readily effectuate all of those purposes by requiring out-of-state wineries, like in-state wineries, to obtain "wine maker" licenses before engaging in direct shipping; requiring them, like in-state wineries, to remit taxes on their shipments; and requiring them, like in-state wineries, to label their packages or obtain an adult signature to

[8] Michigan suggests that its direct-shipping scheme should instead be measured against the more deferential balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because "[o]ut-of-state wineries are not similarly situated to in-state wineries for regulation purposes." 03-1116 Pet. 23 (citing *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216 (2d Cir. 2003)). The only way in which in-state and out-of-state wineries are differently situated here, however, is that in-state wineries may presently obtain a license to engage in direct shipping, whereas out-of-state wineries cannot. Where in-state and out-of-state interests are differently situated only by virtue of the very regulations being challenged, the balancing test of *Pike* is plainly inapplicable. Nor does the fact that there may be many *more* out-of-state wineries than in-state ones, *see* 03-1116 Pet. 4, 23, 24, alter the analysis, *see, e.g.*, *Bacchus*, 468 U.S. at 268-69 (holding that Hawaii statute was discriminatory despite fact that exempted locally produced alcoholic beverages constituted less than 1% of total alcohol sold in the State).

prevent wine from being delivered to minors.[9] Indeed, the FTC reached precisely this conclusion. As the FTC's recent nationwide study demonstrated, those States that have imposed similar requirements have reported "few or no problems with shipments to minors or with tax collection." FTC Report 4.[10] Unsurprisingly, therefore, the Sixth Circuit concluded, "based on the evidence in the record, that defendants have not shown that the Michigan scheme's discrimination between in-state and out-of-state wineries furthers any of the [State's] concerns * * *, much less that no reasonable non-discriminatory means exists to satisfy those concerns." 03-1116 Pet. 15a; 03-1120 Pet. 14a. This conclusion was evidently correct, and the Sixth Circuit's decision to invalidate Michigan's direct-shipping scheme was entirely consistent with this Court's precedents.[11]

[9] The Michigan Liquor Control Commission could impose all of these requirements through the simple expedient of allowing out-of-state wineries to obtain "wine maker" licenses, which would automatically subject them to the detailed requirements currently applicable to direct shipments by in-state wineries. *See* Mich. Comp. Laws § 436.1203.

[10] Citing an Alabama district-court decision, Michigan suggests that Michigan courts may lack personal jurisdiction over *unlicensed* out-of-state producers. *See* 03-1116 Pet. 13-14 & n.12, 16, 24. It seems doubtful at best, however, that Michigan courts would lack personal jurisdiction over an out-of-state producer that had purposely availed itself of the benefits of Michigan law by applying for a direct-shipping license. Contrary to the wholesalers' suggestion, *see* 03-1120 Pet. 11, once personal jurisdiction is established over out-of-state producers, Michigan could prosecute them for any violations of state law—either in state court or, under the Twenty-first Amendment Enforcement Act, in federal court, *see* 27 U.S.C. § 122a.

[11] To the extent that petitioners insinuate that the Webb-Kenyon Act somehow carries independent weight in the analysis, *see, e.g.*, 03-1116 Pet. 17; 03-1120 Pet. 2, 4, 9 & n.5, 11; *cf.* Ohio Br. 18-19 (same), that suggestion lacks merit. The only court of appeals expressly to have addressed this issue has held that, because section 2 of the Twenty-first Amendment, like the Webb-Kenyon Act, could constitute a reconveyance of authority to the States, and because the language of the Webb-Kenyon Act and section 2 is materially identical, the two provisions must be identically construed. *See Bainbridge v. Turner*, 311 F.3d 1104, 1110-11 (11th Cir. 2002).

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The Sixth Circuit invalidated the Michigan direct-shipping scheme because it discriminated against interstate commerce. That holding is consistent not only with the prior decisions of this Court, but also with the decisions of other courts of appeals, all of which have invalidated similar state statutes and upheld only narrower ones.

A. As Michigan concedes, *see* 03-1116 Pet. 7, the Sixth Circuit's holding on the constitutionality of Michigan's direct-shipping scheme is unquestionably consistent with the recent holdings of the Fourth and Fifth Circuits concerning similar state laws.

1. In *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), the Fourth Circuit struck down North Carolina's direct-shipping laws, which unambiguously allowed in-state wineries but not out-of-state wineries to engage in direct shipping, *see id.* at 510. Writing for the court, Judge Niemeyer, joined by Judges Luttig and Traxler, began by tracing the history of the Twenty-first Amendment, noting that the Twenty-first Amendment withdrew some, but not all, of the power of Congress to regulate interstate commerce. *See id.* at 512-13. Citing this Court's decision in *Bacchus*, the court first considered whether the North Carolina statute would "violate[] the Commerce Clause without consideration of the Twenty-first Amendment." *Id.* at 513-14. The court concluded that there was "little doubt that those laws treat in-state manufacturers of wine differently from out-of-state manufacturers of wine, with the undoubted effect of benefiting the in-state manufacturers and burdening the out-of-state manufacturers." *Id.* at 515. The court added that North Carolina had various reasonable non-discriminatory alternatives, including requiring out-of-state wineries to establish an in-state presence and import their wine to that location. *See id.* at 515-16. Turning to the Twenty-first

Amendment, the court reasoned that North Carolina could not identify any Twenty-first Amendment interest that was served by its system of "selective deregulation." *Id.* at 517. The court therefore concluded that North Carolina's law "cannot credibly be portrayed as anything other than local economic boosterism in the guise of a law aimed at alcoholic beverage control." *Id.*

2. So too, in *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), the Fifth Circuit invalidated Texas' direct-shipping laws, which likewise unambiguously allowed in-state wineries but not out-of-state wineries to engage in direct shipping, *see id.* at 393. Like the Sixth Circuit in this case and the Fourth Circuit in *Beskind*, the Fifth Circuit began by analyzing the statute under the dormant Commerce Clause. *See id.* at 395-403. The court found that "[i]t is clear beyond peradventure" that the Texas statute had the effect of discriminating against out-of-state wineries, *id.* at 398, and added that there was substantial evidence that the direct-shipping exemption for in-state wineries was enacted with a discriminatory purpose, *see id.* at 399-400. The court reasoned that "the operable facts of this case are identical to those resulting in the Supreme Court's decision in *Bacchus*." *Id.* at 400. The court concluded that Texas had failed to demonstrate that alternative means were unavailable to achieve its policy goals. *See id.* at 401-02. As to the Twenty-first Amendment, the court stated that the appropriate inquiry, under *Bacchus*, was whether the statute furthered a "core concern" of the Twenty-first Amendment. *Id.* at 404. The court rejected Texas' argument that the Twenty-first Amendment required the Texas laws to be reviewed deferentially, reasoning that such a test was a "legal dinosaur that went extinct long ago in the history of the Supreme Court's Twenty-first Amendment jurisprudence." *Id.* at 406. Instead, citing this Court's decisions in *Bacchus*, *Brown-Forman*, and other cases, the court concluded that it was required to "scrutinize strictly whether a state's statutes are tailored to the Twenty-First Amendment's 'core concerns.'" *Id.* The court

concluded that Texas' laws were not. *Id.* at 406-07.

B. Petitioners contend that the first two circuits to have addressed the issue, the Seventh and Eleventh Circuits, reached conflicting results on the constitutionality of state direct-shipping laws. *See* 03-1116 Pet. 6-10; 03-1120 Pet. 12-15. Not so. Those decisions, and a more recent decision of the Second Circuit, can readily be reconciled with the Sixth Circuit's decision.

1. In *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), the Seventh Circuit upheld Indiana's direct-shipping laws only after finding that they were not discriminatory, and its decision is therefore consistent with the decision below. Admittedly, the *Bridenbaugh* court began its analysis with the Twenty-first Amendment, rather than the dormant Commerce Clause. *Id.* at 851-53.[12] Like the Fourth, Fifth, and Sixth Circuits after it, however, the Seventh Circuit held that the Twenty-first Amendment could not be used to save a state law that discriminated against out-of-state sellers. Writing for the court, Judge Easterbrook reasoned that, under this Court's recent Twenty-first Amendment decisions, "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Id.* at 853. The court noted that, in those decisions, this Court had "appl[ied] an

[12] The wholesalers contend that "[t]he Sixth Circuit explicitly disagreed with *Bridenbaugh*'s approach and its result." 03-1120 Pet. 12; *see generally* Ohio Br. 6-9 (suggesting that circuits are split because they have "applied a different legal test," with some starting their analysis with the dormant Commerce Clause and others with the Twenty-first Amendment). To be sure, the Sixth Circuit did chastise the Seventh Circuit for not fully addressing the dormant Commerce Clause issue, *see* 03-1116 Pet. 16a-17a; 03-1120 Pet. 15a-16a. This Court does not ordinarily grant certiorari, however, to resolve disagreements about the order in which constitutional arguments should be addressed—even if those disagreements are dressed up as disagreements about "the analytical framework to be employed." 03-1274 Br. for Private Respondents 9; *see also* 03-1274 Br. for State Respondents 4, 6, 8, 10 (same).

unconstitutional-conditions approach to the use of the § 2 power," "treat[ing] § 2 as eliminating economic discrimination against *in-state* commerce * * * without authorizing discrimination against *out-of-state* sellers." *Id.* (emphasis added). The court therefore concluded that "§ 2 enables a state to do to importation of liquor * * * what it chooses to do to internal sales of liquor, but nothing more." *Id.*

Although the Seventh Circuit did proceed to uphold Indiana's direct-shipping laws, it did so based on its reading of those laws, which it construed to require that "*every* drop of liquor pass through its three-tiered system and be subjected to taxation." *Id.* The court reasoned that Indiana law barred in-state and out-of-state sellers *alike* from engaging in direct shipping, as long as they also sold alcohol in other States, and added that such sellers could still engage in direct shipping simply by obtaining wholesaler permits. *Id.* at 853-54.[13] On that basis, the court concluded that there was no "functional discrimination" between out-of-state and in-state sellers. *Id.* at 853. Notably, both the Sixth Circuit in this case, *see* 03-1116 Pet. 16a-17a; 03-1120 Pet. 15a-17a, and the Fifth Circuit in *Dickerson*, *see* 336 F.3d at 400-01, distinguished *Bridenbaugh* factually, on the ground that it involved a different statutory scheme. Because *Bridenbaugh* adopted the conventional view of the Twenty-first Amendment, and because the statutory scheme at issue was found to be not discriminatory, *Bridenbaugh* does not conflict with the consistent line of later

[13] The wholesalers contend that the "*Bridenbaugh* opinion makes clear that Indiana, like Michigan, permitted 'local wineries but not [out-of-state] wineries * * * to ship directly to consumers.'" 03-1120 Pet. 12, 13 n.6 (quoting 227 F.3d at 851); *see also* 03-1274 Br. for Private Respondents 12 (same); *cf.* 03-1116 Pet. 8 (contending that "Michigan, in application of its shipping law, is the same as Indiana"). But that is not what *Bridenbaugh*, or the Indiana statute, says. *Bridenbaugh* actually says that Indiana permitted "local wineries, but not wineries *'in the business of selling * * * in another state or country,'* to ship directly" to Indiana consumers. *Id.* (quoting Ind. Code § 7.1-5-11-1.5(a)) (emphasis added).

decisions invalidating more plainly discriminatory direct-shipping laws.

2. In *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002), the Eleventh Circuit declined to reach a final decision on a challenge to Florida's direct-shipping laws, and its decision is thus consistent with the decision below. Florida's laws allowed in-state wineries but not out-of-state wineries to engage in direct shipping using their own vehicles (and, at least in practice, by common carrier). *See id.* at 1107 & n.5. Like the Fourth, Fifth, and Sixth Circuits, the Eleventh Circuit began by concluding that the statutory scheme discriminated against interstate commerce. *See id.* at 1108-11. The court reasoned that Florida's regulatory scheme discriminated on its face, and that Florida could adopt various non-discriminatory alternatives (including a requirement that out-of-state wineries obtain licenses). *See id.* at 1109-10.

The Eleventh Circuit then turned to the Twenty-first Amendment. *See id.* at 1111-15. Citing this Court's decision in *Healy*, the court reasoned that "the Amendment falls short of giving states free rein in regulating the importation of alcoholic beverages." *Id.* at 1112. The court concluded that, where a state law amounted to "mere economic protectionism" under *Bacchus*, the Twenty-first Amendment had no independent effect. *See id.* at 1112-13. To be sure, the court drew a distinction (in our view illusory, *see Bacchus*, 468 U.S. at 271) between laws that "amount to mere economic protectionism," on the one hand, and laws that "discriminate on their face," on the other, and suggested that the Twenty-first Amendment could affect the analysis in the latter instance if a State could show that the regulation is "genuinely need[ed]" to effectuate a "core concern" of the Twenty-first Amendment. *Bainbridge*, 311 F.3d at 1112-13 (internal quotation omitted). However, the court then remanded for factfinding on whether Florida's facially discriminatory law was needed to effectuate a core concern—though it rejected outright Florida's argument that the

law was necessary to protect minors, and expressed skepticism about the argument that the law was necessary to collect taxes. *See id.* at 1114-15. The Eleventh Circuit's decision in *Bainbridge* was therefore effectively interlocutory. Because the district court may ultimately conclude, like the Fourth, Fifth, and Sixth Circuits, that the State's justifications for its discriminatory regulatory scheme are insufficient, the Eleventh Circuit does not presently stand in conflict with those circuits.[14]

3. Finally, in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004), the Second Circuit upheld New York's regulatory scheme only after determining that it was not discriminatory, and that decision thus does not conflict with the decision below. Critically, New York's regulatory scheme allowed out-of-state wineries to obtain direct-shipping licenses, provided that they paid a license fee and established a physical presence in the State by "maintain[ing] a branch factory, office, or storeroom within the state." N.Y. Alco. Bev. Cont. Law §§ 3(37), 76(4), 77(2). The Second Circuit expressly distinguished the New York statutory scheme from the ones before the Fourth, Fifth, and Eleventh Circuits, and before the Sixth Circuit *in this case*. *See Swedenburg*, 358 F.3d at 229 n.3.[15]

Like the Seventh Circuit, the Second Circuit began its constitutional analysis not with the dormant Commerce Clause, but rather with the Twenty-first Amendment. *See id.* at 230.

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[14] Admittedly, as the petitioners note, *see* 03-1116 Pet. 9; 03-1120 Pet. 13, the Eleventh Circuit did suggest, in a short footnote, that the district court should apply something less than strict scrutiny to the State's justifications on remand, *see Bainbridge*, 311 F.3d at 1114 n.17. To the extent that this standard of review is more deferential than the standard adopted by other circuits, however, that difference does not justify this Court's review—especially since the district court may yet reach the same result as those other circuits even under that apparently more deferential standard.

[15] The Second Circuit's opinion, like the Seventh Circuit's in *Bridenbaugh*, therefore belies the (unelaborated) claim of *amici* that the regulatory scheme at issue was "virtually identical" to Michigan's. Ohio Br. 4; NABCA Br. 7.

Although the court expressed its disagreement with those circuits that chose to begin with the dormant Commerce Clause, it stated that it "need not assess the other circuits' determinations, as the statutes challenged in those cases were *significantly different* from the regulatory regime at issue here." *Id.* at 231 n.7 (emphasis added). The court noted, moreover, that the Fourth Circuit had suggested that a "presence" requirement, like that imposed by New York law, could constitute a possible non-discriminatory alternative to an outright ban on direct shipping by out-of-state wineries. *See id.*

The court then considered the Twenty-first Amendment, tracing its history and this Court's decisions construing it. *See id.* at 230-37. Although the court seemed to give section 2 of the Twenty-first Amendment a robust construction, *see id.* at 236-37, the court ultimately conceded that protectionist laws were not entitled to the same degree of deference under section 2, *see id.* Crucially, the court found that there was "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests," on the ground that "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state." *Id.* at 237. The court therefore concluded that the New York regulatory scheme allowed direct shipping "in a non-discriminatory manner." *Id.* at 239. Because New York's statutory scheme, like Indiana's, was found to be non-discriminatory, the Second Circuit's decision, like the Seventh Circuit's in *Bridenbaugh*, does not conflict with the decision below.

III. THIS CASE IS A LESS THAN IDEAL VEHICLE FOR CONSIDERATION OF THE UNDERLYING CONSTITUTIONAL QUESTION.

Even if this Court were to conclude that the Sixth Circuit's decision was inconsistent with decisions of this Court or other circuits, this case presents a less than ideal vehicle for consideration of the underlying constitutional question.

1. The primary problem with this case is that it does not present the logically subsequent question whether, if a state direct-shipping law is held to be unconstitutional, the appropriate *remedy* for the constitutional violation is to allow direct shipping by out-of-state wineries or to ban direct shipping by in-state wineries. The district court did not have occasion to reach the remedy question because it upheld the Michigan direct-shipping scheme. Before the Sixth Circuit, none of the parties briefed the question of the appropriate remedy, and the court of appeals opted merely to reverse the district court's decision on the merits and remand for entry of judgment in favor of the plaintiffs. *See* 03-1116 Pet. 18a, 20a; 03-1120 Pet. 17a, 20a. Thus, far from "effectively granting the plaintiffs the relief requested," *id.* at 5, or somehow advantaging out-of-state wineries over in-state wineries, *id.* at 6, the court of appeals was entirely silent on the issue of the appropriate remedy, leaving the issue to the district court on remand and thereby postponing its own consideration of the issue.

While the courts of appeals have addressed the *constitutionality* of state direct-shipping laws in a consistent manner, they have reached conflicting results on the appropriate *remedy* for a constitutional violation. *Compare Dickerson*, 336 F.3d at 407-09 (allowing direct shipping by out-of-state wineries), *with Beskind*, 325 F.3d at 517-20 (prohibiting direct shipping by in-state wineries). Although those decisions turn to some extent on the structure of the state regulatory scheme, *see, e.g.*, *id.* at 519, they also present a broader question whether extending benefits to disadvantaged parties or imposing burdens on advantaged parties is the more appropriate remedy for dormant Commerce Clause violations more generally, *see, e.g.*, *Dickerson*, 336 F.3d at 407-08. And by claiming (albeit erroneously) that the Sixth Circuit's decision conflicts with the Fourth Circuit's decision in *Beskind* on the issue of the appropriate remedy, petitioners themselves implicitly concede that the remedy issue is independently worthy of this Court's

consideration. *See, e.g.*, 03-1116 Pet. 13-14; 03-1120 Pet. 13-14. This Court should therefore wait for a case that presents not only the constitutional question, but also the remedial one.[16]

2. Since the petitions in this case were filed, plaintiffs in the New York direct-shipping litigation have also filed a petition for certiorari from the Second Circuit's decision. *See Swedenburg v. Kelly*, No. 03-1274 (petition filed Mar. 8, 2004). That petition should be denied for the same reasons as the petitions in this case, and for some additional ones. As the Second Circuit itself recognized, *Swedenburg* involves an unusual statutory scheme, in which out-of-state wineries *can* engage in direct shipping provided they establish a "physical presence" within the State. *See, e.g.*, 358 F.3d at 229 n.3, 231 n.7.[17] And by virtue of its holding that the New York regulatory

[16] In a quixotic detour, Michigan suggests that this case would be a particularly *good* vehicle for this Court's consideration because it involves a facial challenge. *See* 03-1116 Pet. 18-21. The Sixth Circuit, however, held only that the Michigan *regulatory* scheme, as construed and applied by the Michigan Liquor Control Commission, was facially, or plainly, *discriminatory*—not that plaintiffs were bringing only a facial (as opposed to an as-applied) challenge to the Michigan *statutory* scheme. *See, e.g.*, 03-1116 Pet. 15a; 03-1120 Pet. 14a. It is clear from the complaint that the plaintiffs were bringing both. *See, e.g.*, C.A. App. 21.

[17] The petitioners in *Swedenburg* suggest that New York law does *not* allow out-of-state wineries to engage in direct shipping if they establish a mere "physical presence" in the State, but allows them to do so only if they actually open a *winery* in the State. *See, e.g.*, 03-1274 Pet. 2-3, 15-16. To the extent that there is any ambiguity on the threshold factual question of what New York law actually requires (and thus on the legal question of whether New York law is discriminatory), such ambiguity counsels against, not in favor of, the granting of certiorari—as the plaintiffs in *Swedenburg* themselves contended in *opposing* certiorari from the Seventh Circuit's decision in *Bridenbaugh*. *See* 00-1323 Br. of *Amici* David Lucas and Juanita Swedenburg 5-6. In any event, the better reading of New York law is that it does allow direct shipping upon the establishment of a "physical presence" in the State. *See* N.Y. Alco. Bev. Cont. Law §§ 3(37), 76(4), 77(2). Notably, the respondents in *Swedenburg* have acknowledged that New York's regulatory scheme is "meaningfully different" from Michigan's, 03-

scheme was constitutional, the Second Circuit, like the Sixth Circuit, did not reach the remedial issue at all.[18]

Moreover, *Swedenburg* may shortly be rendered moot by pending legislation that would allow direct shipping by out-of-state wineries in States that have reciprocal laws.[19] While the governor of New York previously vetoed a similar bill after it was passed by the New York legislature, *see Swedenburg*, 358 F.3d at 239, the governor recently reversed course and included the proposed legislation in his most recent state budget proposal, *see, e.g.*, Marc Humbert, *Wineries Cheer Proposal for Direct Shipping*, Albany Times Union, Jan. 23, 2004, at B3. Notably, the staff of the Federal Trade Commission has expressed its support for the proposed legislation in a letter to leading members of the New York legislature. *See* Letter from Todd J. Zywicki *et al.* to William Magee *et al.* (Mar. 29, 2004), *available at* http://www.ftc.gov/opa/2004/03/nywine.htm. Because of this pending legislation, and because of the peculiar nature of the regulatory scheme being challenged, the petition in *Swedenburg* should be denied in any event.[20]

1274 Br. for State Respondents 8; *see also* 03-1274 Br. for Private Respondents 7-8 (same), and have added that "[t]hat factor may be significant in this Court's analysis," *id.* at 8 n.3, and indeed "perhaps dispositive," 03-1274 Br. for State Respondents 7.

[18] Should the Court choose to grant certiorari despite the absence of the remedial issue in either of these cases, the Sixth Circuit case presents a considerably better vehicle because it involves the more common regulatory scheme in which out-of-state wineries are prohibited outright from engaging in direct shipping. *See* Ohio Br. 10 (stating that "Michigan's law provides a perfect example of typical State efforts to regulate alcohol shipments"). In that event, the Court should grant certiorari on the two instant petitions, and hold the petition in *Swedenburg*.

[19] Astonishingly, the state respondents in *Swedenburg* suggest that the possibility that the case will be mooted should have no bearing on this Court's decision as to whether to add the case to its calendar. *See* 03-1274 Br. for State Respondents 20 n.6.

[20] The petitioners in *Swedenburg* contend that their case would be a

3. To the extent that this Court were to conclude that these cases present potentially certworthy issues, the Court can afford to wait for a better vehicle for their consideration. As petitioners concede, *see, e.g.*, 03-1120 Pet. 15 n.8, numerous other challenges to direct-shipping laws are currently pending in the federal courts—including the challenge to Florida's direct-shipping laws, which is still pending before the district court on remand, *see Bainbridge v. Turner*, No. 99-CV-2681 (M.D. Fla.). Our understanding is that litigation is being actively considered in other jurisdictions as well. And many States are not waiting for their laws to be invalidated, but are instead amending them in response to the outcry from consumers and wineries alike. Should a genuine circuit split arise on the constitutionality of state direct-shipping laws, this Court can act then. There is no need for it to weigh in now—or to weigh in here. These cases are more like a 2000 Bordeaux than a 1961. All of the pending petitions for certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for certiorari. In the alternative, in light of the FTC's position on the direct shipment of wine, and the regulatory interests of the Alcohol and Tobacco Tax and Trade Bureau and other federal agencies, the Court may wish to call for the views of the Solicitor General.

Respectfully submitted,

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particularly good vehicle because plaintiffs challenged the New York regulatory scheme under both the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV. *See* 03-1274 Pet. 24-27. Petitioners do not contend, however, that there is a circuit split on the question whether state direct-shipping laws violate the Privileges and Immunities Clause, and the Second Circuit (operating on the premise that New York law allowed direct shipping by out-of-state wineries provided they established a "physical presence" within the State) summarily rejected petitioners' argument. *See Swedenburg*, 358 F.3d at 239.

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